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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 319

On Application for Writ of Certiorari to the Supreme Court of the State of Michigan

HENRY R. PICKETT, RICHARD L. KIRBY

-and-

HAROLD WIRSING,

Petitioners,

v.

STATE OF MICHIGAN,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

A

Reference to Official and Unofficial Reports of Opinions Delivered in Courts Below.

In addition to the opinions of the Michigan Supreme Court cited in petitioner's brief,

People v. Pickett, et al, 339 Mich. 294, 63 N.W. 2d 681, and

People v. Birch and Pickett, et al., 329 Mich. 38, 44 N.W. 2d 959,

reference should be made to the following opinions of the court of first instance:

Opinion (294) of circuit judge denying motion (29) to quash the information (25).[1]

Opinion (301) of trial judge, denying motion (299) for new trial.

B

Grounds upon which Jurisdiction Invoked.

We concede that the petition for certiorari was filed within the time allowed by law, 28 U.S.C. § 2101 (d), Revised Rule 22 (1), but take the position that petitioners have failed to show "special and important reasons" for granting the writ, Revised Rule 19, or that the highest court of the State has decided a federal question of substance not heretofore decided by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.[2]

C

Questions Presented for Review.

In opposing the petition for certiorari, it is our position that only two questions are presented for immediate decision:

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[1]

Unless otherwise plainly indicated, numbers in parentheses refer to pages of the record printed for use of the Michigan Supreme Court, and filed in this Court pursuant to Revised Rule 21 (4).

[2]

E.g., the decision of this Court, In re Oliver, 333 US 257, relied upon by counsel in challenging the constitutional validity of Michigan's 1-man grand jury law, has no application to the case at bar

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1. Did the court below decide a federal question of substance not heretofore determined by this Court, or decide it in a way probably not in accord with applicable decisions of this Court?

2. Have petitioners shown "special and important reasons" for granting the writ?

D

Constitutional Provisions and Statutes Involved.

1. The Michigan 1-Man Grand Jury Law may properly be cited as

> Michigan Code of Criminal Procedure, Chapter 7, §§ 3, 4, 4a, 5, 5a, 6, 6a and 6b, as amended by Pub. Acts 1951, No. 276 [Michigan Stat. Ann. (Henderson) 1953 Cum. Supp. §§ 28.943-28.946 (2)].

2. Chapter 6 of the code aforesaid maps the course of procedure in the examination of offenders, from reception of a complaint and examination of witnesses by the magistrate (§ 2), the issuance of the warrant (§ 3), through the preliminary examination to determine probable cause (§§ 4 - 12), to the discharge of the respondent or, if probable cause be found, to the binding of the prisoner over for trial in the circuit court (§ 13). We publish as Appendix "A," post, p. 18, a true copy of §§ 1, 2, 3, 4, 5, and 13 of said chapter which may be cited as

> Michigan Code of Criminal Procedure, Chapter 6. § 1, 2, 3, 4, 5, and 13 [Michigan Stat. Ann. (Hend §§ 28.919 - 28.923, and 28.931].

3. Section 505 of the Michigan Penal Code, providing punishment upon conviction of "any indictable offense at the common law," cited by petitioners as § 28.773, Michigan Statutes Annotated (Henderson), has a long and significant legislative history, the course of which may be traced through the following:

(a) The act of September 16, 1810, enacted by the Governor and Judges of the Territory of Michigan, Vol. I, Territorial Laws of Michigan, p. 900, provided:

> "That no act of the parliament of England, and no act of the parliament of Great Britain, shall have any force within the territory of Michigan. . . ."

(b) In 1827, however, the legislative council of the territory of Michigan passed "An Act for the punishment of Crimes," Vol. II, Territorial Laws of Michigan, pp. 542-557, which provided in § 62, p. 556,

> "That assaults, batteries, false imprisonment, mayhems, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offences of an indictable nature at common law, and not provided for by this act, or some other act of the Territory of Michigan, shall be punished etc."

(c) When Michigan was admitted to the Union, her Constitution of 1835, Schedule, § 2, provided that "all laws now in force in the territory of Michigan, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature."

(d) Five years later, the senate and house of representatives of Michigan enacted Act No. 39 of the Laws of 1840,

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§ 7 of which contained practically the same phraseology as that found in the statute of 1827, but in 1846, when legislature revised and consolidated the laws of Michigan as the Revised Statutes of 1846, the language of the 1827 Act was slightly modified in § 22 of Chapter 161 of that Revision, p. 689, to read as follows:

> "Sec. 22. Every person who shall commit any indictable offence at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be punished etc."

(e) In 1850 the people of the State ratified their new Constitution, Schedule 1 of which, as in 1835, provided that the common law and the statute laws then in force, not repugnant to the Constitution, should "remain in force until they expire by their own limitations or are altered or repealed by the legislature." This identical provision is found in the present Constitution of 1908, Schedule, § 1.

(f) Meanwhile, thereafter, and until 1927, the provisions of § 22, Chapter 161, Revised Statutes of 1846, were carried in the several compilations.[31]

In 1927, by Pub. Act No. 175, the legislature adopted the Code of Criminal Procedure and, in § 15, Chapter 9 thereof, reenacted § 22 aforesaid into law (Comp. Laws 1929, § 17343).

(g) Finally, in Michigan Pub. Acts of 1931, No. 328, the legislature repealed § 15 of Chapter 9 of the Code of Criminal Procedure and reenacted its provisions into law as § 505 of the Michigan Penal Code [Comp. Laws Mich. 1948, § 750.505 (Mich. Stat. Ann.—Henderson— § 28.773)].

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[31] Comp. Laws 1857, § 5958; Comp. Laws 1871, § 7824; Comp. Laws 1897, § 11795; and Comp. Laws 1915, § 15622.

E

Concise Statement of the Case.

We deem the following to be necessary in correcting inaccuracies and omissions in the statement of petitioners [Revised Rule 40 (3)]:

1. Although several witnesses incriminated the petitioners (69-251), the latter failed to testify in their own behalf, and the only witness they called to the stand (261) merely explained the absence of one Charles Sumner.

2. On page 6 of the petition, it is stated:

> "The grand juror was subpoenaed by the petitioners. However, the trial court ruled only one question could be asked him: in effect, in your *opinion* (the emphasis is that of counsel) does the testimony of the witnesses as given in court at the trial differ substantially from their testimony before you as a grand juror? Answer Yes or No (R. 257-260)."

This, we think, requires modification.

Shortly before the first witness was sworn at the trial, and while preliminary motions were in order, defense counsel stated (63) he thought petitioners were entitled to the grand jury records, and to the testimony of Judge Leibrand, the grand juror, in order to determine whether, as a matter of fact, he had acted in a judicial capacity. If he did not function properly, under the separation of (governmental) powers, then, counsel urged, it would follow that the indictments (warrants) would be void. And counsel moved the court (67) to take the testimony of Judge

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Leibrand on the basis he had announced. Thereupon the trial judge announced (67-68) he would reserve his final ruling until such testimony was tendered.

At the close of the State's case, the court denied the motion aforesaid (252-255) but he also ruled (257) that defense counsel could examine the grand juror as a witness and ask him whether the testimony given by witnesses before him differed from their testimony at the trial.

Counsel replied (257) he had asked the court reporter to prepare a transcript of witness Menosky's testimony (69-133), and that the Arney testimony (183, 189-231) was already available. Although he might want to go into the testimony of others, those were the two witnesses in whom he was interested (258).

A little later in the proceedings [apparently after a recess] counsel requested that the defense be supplied with the testimony of Menosky and Arney taken before the grand jury, and that they be permitted to call the grand juror who was there at their request, to take his testimony regarding the activities of the grand jury to discover whether or not factually it had conducted itself entirely in a judicial capacity. The following colloquy (260) then occurred between court and counsel:

> "**The Court**: I understand that you do not now wish to call him for the purpose of inquiring whether or not any of the testimony given by the witnesses on this trial differs substantially from that given by those same witnesses in the investigation?
>
> **Mr. Cline**: That is right, your Honor, we don't desire to call him for that purpose."

3. On pages 6 and 7 of their petition, counsel cite certain instances of what they object to in the grand jury proceedings:

(a) They complain that certain witnesses were called before the grand juror and his investigators and examined in a lawyer's office (94), a private home (103), the county jail (105, 140), and a hotel room (220).

(b) Each of several witnesses, it is said, was called before the grand juror and his investigators from 3 to 4 times and interrogated on each occasion. The witness Menosky stated (125-130) that his testimony was pretty much the same, there might be differences"; another witness, Grubbs, claimed (146, 147) that his answers were the same each time, although, on the trial, he could not remember what questions were asked (145).

(c) And, it is claimed, the witness Talkow, a business man, testified that the grand jury had "convinced" him that someone had telephoned him (155).

It is to be noted, however, that in the latter instance, Talkow did not claim he had been coerced or intimidated and the inference is fair that when he used the word "convinced" (154) he merely meant that his recollection had been refreshed when the grand juror or the prosecuting attorney had read to him certain portions of the grand jury testimony (154). In any event he could not remember any particularly impressive telephone conversation.

Each witness who appeared at the trial in circuit court, as well as Arney who was called to the stand by the State at the preliminary examination (189), testified freely and voluntarily without claim of coercion or intimidation.

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Furthermore, it should be noted, the prosecution interposed no objections to this line of testimony on cross-examination, and the general context indicates that it was received for the sole purpose of testing the credibility of the witnesses.

F

Issues Raised in State Court.

We also note the following inaccuracies and omissions in petitioners' statement of issues raised in the State court:

1. On page 9 of the petition it is said that

> "motions for leave to examine the grand jury testimony for the purpose of impeachment and contradiction were again made at the opening of the trial (R. 63-67) upon express constitutional grounds (R. 65)."

We would add that the first request of this nature in the trial court, appears in the prayer (34) of the defense motion (29) "to dismiss the complaint, warrant, and information, if filed," but it was predicated, among other things, on the ground that inspection of grand jury records would disclose that the grand juror did not function in a judicial capacity (30, 31). We fail to find that production of such records or testimony was sought "for the purpose of impeachment and contradiction."

Subsequent motions pressed at the opening of trial (63-68), to which reference is had in the petition (p. 9), were based upon the same ground and at that time an inspection of grand jury testimony was not sought for purposes of impeachment or to show contradictions in the testimony of witnesses for the State, none of which had yet taken the stand.

2. Finaliy, at the close of the State's case, when the court afforded defense counsel opportunity to examine Judge Leibrand, the grand juror, they announced a lack of desire to produce the judge "for the purpose of inquiring whether or not any of the testimony given by the witnesses on . . . [the] . . . trial differs substantially from that given by those same witnesses in the investigation" (260). Commenting upon counsel's position, the trial jurist said (260):

> "It is now 11 o'clock and the matter has been held up for an hour and a half this morning to give Judge an opportunity to make the necessary comparison, and then the court was informed that counsel had had a conference with Judge Leibrand and decided not to call him for that purpose."

G

Reasons for Opposing Certiorari.

First: The court below did not decide a federal question of *substance* not heretofore determined by this Court, or decide it in a way probably not in accord with applicable decisions of this Court.[4]

Although counsel present several novel questions not heretofore determined by this Court, these possess little, if any substance:

1. Questions 1 and 2:—The first two questions, based upon the claim that in conducting his investigation the

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[4] The precise question of procedural due process decided by this Court In re Oliver, 333 US 257, is not involved in the case at bar.

grand juror exerted executive as well as judicial power,[5] should be considered as non-federal unless in usurping executive functions the grand juror also denied due process.[6] Petitioners, however, have failed to demonstrate that such irregularities in grand jury procedure were reflected upon them at the trial in such a manner as to deny them any fundamental right guaranteed by the Due Process Clause.

The irregularities enumerated on pages 12 and 13 of the petition for certiorari are as follows: that the grand juror examined witnesses in a hotel room "at night," or, as was testified (220), between the hours of 8.00 and 9.00 in the evening, in a private home (111), in a lawyer's office (99), and in the county jail (108, 141, 157, 222), though not in a cell (109).

It is also claimed that witnesses were questioned "in relays," but, we respectfully submit, this charge is not substantiated in full by testimony (141, 221) that the judge, the prosecuting attorney and an investigator, together with a stenographer, were present together in the room when questions were asked.[6a] And while it is said that one witness was "threatened with prosecution" unless he testified, we cannot read such a threat into testimony (228-229) that the judge at one time remarked that Arney "would be a witness or a defendant" (229). And most certainly it was not shown that the witness was thereby coerced.

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[5] It is contended that such an invasion into the realm of the executive department, violated Article IV of the Michigan Constitution forbidding it, thus infringing rights guaranteed in the Due Process Clause. Cf. Local Union 170 v. Circuit Judge, 322 Mich. 332.

[6] Dryer v. Illinois, 187 US 71, 84; Crowell v. Benson, 285 US 22, 57; and Highland Farms Dairy v. Agnew, 300 US 608, 612.

[6a] The intended implication is that such a witness was subjected to continuous questioning for hours until exhausted to the point of forced confession, a situation not present here.

Gathered together and compressed without detail into the narrow limits of two pages of a compact petition for certiorari, such statements carry grave implications, but they lose force when restored to context. Moreover, they had no impact upon the trial or other proceedings which followed, nor did they result in substantial prejudice to the petitioners.

a. Although the word is often used in connection with Michigan's 1-man grand jury, the procedure does not lead to an indictment and immediate trial but merely culminates in the issuance of a warrant authorizing the apprehension of an accused person in order that he may be brought before a magistrate. In the case at bar, the warrant was followed by a preliminary examination to determine whether probable cause existed to hold the defendants for trial in the circuit court (Appendix "A," post, p. 18). Petitioners were represented by counsel throughout and they were accorded every known constitutional privilege during their trial. They did not, however, take the witness stand to deny their guilt, nor did they call witnesses in their defense.

b. The witnesses who had been examined by the grand juror and his aides, testified at the trial fully, frankly, willingly, freely and voluntarily. The prosecution did not consider them adverse or resort to cross-examination. The grand jury incidents upon which counsel now rely, were related by them when cross-examined by defense counsel to test their credibility, and the prosecuting attorney interposed no objections to questions asked for that purpose. Moreover, no claim was made that any witness had been coerced or intimidated by the grand juror into giving such testimony. Hence, it cannot be said that anything but the truth prejudiced the petitioners.

2. **Questions 3 and 4:** Since it does not satisfactorily appear of record that the prosecution made use of transcripts of grand jury testimony for the purpose of impeachment or to show contradictions in testimony, and since the petitioners were accorded and later abandoned (260) the coextensive privilege of calling the grand juror or the stenographer who took the grand jury testimony,[7] to testify as to whether such testimony was different from the evidence given by witnesses at trial,[8] due process was not denied because the trial judge refused to allow defense counsel "any broad or blind fishing expedition" among grand jury transcripts.[9]

3. **Questions 5 and 6:** There is no substance in the claim that § 505 of the Michigan Penal Code,[10] admeasuring punishment for those convicted of an offense indictable at common law, in this case, conspiracy, in any manner violates the Due Process Clause (Question 5) or that, as here applied, it offends the 14th Amendment (Question 6).

As disclosed in our statement "D," *ante*, p. 3, the legislative history of § 505 of our penal code, first law in force since 1827, while the crime of conspiracy has been recognized as a common-law offense since the earliest decisions of Michigan's highest court,

People v. Richards, 1 Mich. 217;

Alderman v. People, 4 Mich. 414;

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[7] Counsel never offered to call the stenographer.

[8] The court below cited People v. McCrea, 303 Mich. 213, 243-246 [cert. denied, 318 US 783], and People v. Roxborough, 307 Mich. 575, 584 [cert. denied, 323 US 749] to sustain such a procedure.

[9] Please see and compare Gordon v. United States, 344 US 414, at 419.

[10] Mich. Comp. Laws 1948, § 750.505 [Mich. Stat Ann. (Henderson) § 28.773].

People v. Saunders, 25 Mich. 119.

And in recent times, prosecution on charges of common-law conspiracy has been instituted to convict and punish corruption in public office, e.g.,

People v. Tenerowicz, 266 Mich. 276, the mayor of Hamtramck and police officers, conspiracy to permit keeping and operating of houses of ill fame;

People v. McCrea, 303 Mich. 213; certiorari denied, 318 US 783; prosecuting attorney and others, conspiracy to obstruct justice;

People v. Wilcox, 303 Mich. 287; certiorari denied, id., 318 US 783; sheriff, conspiracy to obstruct justice;

People v. Roxborough, 307 Mich. 575; certiorari denied, 323 US 749; rehearing denied, 323 US 815; conspiracy to corrupt public officials in respect of operation of lotteries;

People v. Watson, 307 Mich. 596; certiorari denied, 323 US 749; idem.,

People v. Reading, 307 Mich. 616; mayor of city of Detroit, conspiracy to obstruct justice;

People v. Ryckman, 307 Mich. 631; police officers, conspiracy to obstruct justice;

People v. Delano, 318 Mich. 557; certiorari denied, 334 US 818; a senator with members of house, conspiracy to corrupt legislature;

and

People v. Logie and Diggs, 321 Mich. 303; certiorari denied, 335 US 885; rehearing denied, 335 US 905; senator, conspiracy to corrupt legislature.

4. Question 7: There is a similar lack of substance to the final contention that petitioners' constitutional right to be confronted by the witnesses, was abridged upon reception in evidence of the testimony of one Arney adduced during the preliminary examination and read to the jury after the witness had asserted his privilege against self-incrimination. The court below sustained this procedure upon the principle that the constitutional rights of the accused are not abridged, where the accused at any stage of the proceedings, upon the same accusation, has once been confronted by the witness against him, with an opportunity to cross-examine that witness.

In discussing the question, the opinion of the court is so sound that we choose, for the present purpose, to stand thereon (25a-31a), 339 Mich., 301-308.

Second: By virtue of the foregoing, it is manifest that the petition for certiorari fails to disclose any "special and important reasons" for granting review.

H

Conclusion.

We therefore respectfully submit that the record in this cause fails to reveal any federal question of substance decided by the highest court of Michigan, or any special or important reason for granting a writ of certiorari to review the final judgment of the court below. For these reasons, we respectfully submit that the petition should be denied.

Respectfully Submitted,

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Appendix "A"

Pertinent section of Chapter 6 of Michigan Code of Criminal Procedure—"Examination of Offenders."

"**Sec. 1.** The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination." [Michigan Stat. Ann. (Henderson) § 28.919].

"**Sec. 2.** Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him." [Michigan Stat. Ann. (Henderson) § 28.920].

"**Sec. 3.** If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein." [Michigan Stat. Ann. (Henderson) § 28.921].

"**Sec. 4.** The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for

examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent." [Michigan Stat. Ann. (Henderson) § 28.922].

"**Sec. 5.** If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial." [Michigan Stat. Ann (Henderson) § 28.923].

"**Sec. 13.** If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial." [Michigan Stat. Ann. (Henderson) § 28.931].